Supreme Court, U.S.
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No. 92-1956

In The

Supreme Court of the United States

October Term, 1993

CONSOLIDATED RAIL CORPORATION,

Petitioner,

v.

JAMES E. GOTTSHALL and ALAN CARLISLE,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT ALAN CARLISLE'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether the opinion of the Third Circuit Court of Appeals is consistent with established precedent in holding that a railroad worker has suffered a compensable injury when his workplace was maintained in an unsafe condition which resulted in foreseeable adverse effects on physical health?

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RESPONDENT ALAN CARLISLE'S BRIEF IN OPPOSITION

Respondent Alan Carlisle respectfully submits that this Court should deny the Petition for Writ of Certiorari. The Petitioner seeks review of the opinion issued in this case by the United States Court of Appeals for the Third Circuit. (See Appendix, A-73).

STATEMENT

Respondent, Alan Carlisle, filed this suit under the Federal Employers Liability Act, 45 U.S.C. Sec. 51, *et seq.*

("FELA"), against Consolidated Rail Corporation ("Conrail"), his former employer. Plaintiff claimed that Conrail breached its non-delegable duty to provide him with a safe place to work by exposing him to unreasonably dangerous conditions with foreseeable hazards to his health. The jury returned a verdict in favor of the plaintiff in the amount of $386,500.00. Conrail moved for judgment notwithstanding the verdict. The trial court denied that Motion in a written memorandum and order on March 25, 1992 (Appendix, A-106). An appeal to the United States Court of Appeals for the Third Circuit followed and was decided in Respondents favor on March 29, 1993. (Appendix, A-73).

After starting as a train dispatcher for Conrail in 1976, respondent, Alan Carlisle, moved up to supervising other train dispatchers and by 1981, was responsible for all the train movements in and out of Washington, D.C., Baltimore, Wilmington and Philadelphia. Some of these trains carried passengers, but most carried freight. A large portion of that freight was hazardous material. From 1984 and 1987, Conrail consolidated jobs and reduced its work force, forcing the dispatchers and respondent, Alan Carlisle, their supervisor, to make more decisions, more quickly and with less data.

Before the tower operators were eliminated by Conrail, they had served as the "eyes and ears" of the train dispatchers, since the dispatchers had no visual way to monitor the trains from the control center. The tower operators were analogous to forward observers in the field; they would see where a train was on track and send the information back to the dispatchers. In order to communicate this information among the dispatchers, Mr.

Carlisle would shout it out to whoever needed it, amidst telephones ringing and radios transmitting and receiving. Respondent had to hold all this vital information in his memory, and make split second decisions that affected the safety of each train, its passengers, crew, freight and surrounding environs.

In 1988, Mr. Carlisle's already extensive job responsibilities shifted and increased. He was transferred to the South Philadelphia operation in May of 1988 where he kept many of the train dispatching and supervisory responsibilities of his previous position. In addition, Conrail reduced the number of people working each shift, and Mr. Carlisle was given the responsibilities from what had previously been handled by other workers. He had to oversee several train yards in Philadelphia, enforce compliance with safety rules and perform the function of a troubleshooter. As a troubleshooter he had to go to the site of a train that was stopped for some reason, discover and remedy the problem. He requested police protection many times, since the areas in which he worked were often deserted trainyards and isolated crime-ridden areas, but his employer refused him.

Beginning in May of 1988, Conrail required respondent to work 15 hour days, from 6 to 13 consecutive days at a time. In one 2-week period, he worked in excess of 225 hours. During his time at work, Mr. Carlisle was prohibited from taking any breaks for lunch or rest, and was verbally abused at work and at home by his supervisor who habitually called him at home in the middle of the night. As a train dispatcher, Mr. Carlisle was under pressure to achieve on-time performance and he became concerned when Conrail instructed him to ignore safety

concerns, such as poor maintenance or malfunctioning equipment, which would have caused delay.

As the numbers of hours and consecutive days lengthened, respondent experienced physical symptoms. He felt severe fatigue and headaches that would last all day. He lost his appetite and lost weight – from 15 to 20 lbs. – as the court observed "a significant amount for the not-so-hefty man the court observed at trial." (Trial Court Opinion, Appendix A-129). He suffered severe insomnia and he used alcohol to cut his internal stress and sleep. When he did fall asleep, his wife would often find him sleepwalking once with a lighted cigarette in his hand. Plaintiff fell into a major depression and with it came a decrease in his awareness of what was going on around him at home and at work. He feared that he was going to cause some serious injury to himself or others.

Mr. Carlisle's treating psychiatrist, Dr. Real, and internationally known stress expert, Dr. Rosch, unequivocally drew the causation link between Mr. Carlisle's working conditions and an adjustment disorder which evolved into major depression. In the opinion of both, respondent's railroad working conditions caused his severe mental and physical health problems. Even petitioner's expert psychiatrist, Dr. Kool, agreed, testifying that respondent suffered from an adjustment disorder, caused, at least in part, by his work.

The unsafe nature of respondent's work place and the foreseeability of injury to him were well known to petitioner. Mr. Carlisle testified that he complained to his

supervisor about the stress of his long hours and overwhelming job responsibility and resulting physical symptoms. Respondent's wife also testified that in the months before his breakdown she herself complained to the respondent's immediate railroad supervisors. The testimony of six other Conrail train dispatchers who had worked previously in respondent's same office indicated that they too had each suffered various medical illnesses ranging from heart attacks to nervous breakdowns, after being exposed to virtually the same working conditions as Mr. Carlisle. These dispatchers testified that they told Conrail that unsafe working conditions and stress from the job had caused each of their illnesses. In addition, Conrail was aware of two government reports concerning the dangers of respondent's work place. First, a 1974 FRA report found that the stress of the job of the train dispatching caused negative medical consequences on employees. It noted specific sources of stress such as the dependence on memory, inadequate staffing, conflict between management's need for production and safety and the pressure for perfect performance since a mistake could result in substantial injury.

The second report was a 1987 Federal Railway Administration (FRA) Safety Assessment of Conrail and its Philadelphia office where Mr. Carlisle worked. In particular, the report found that the dispatching workload was "excessive to the point that there was an appearance of having made decisions which were not well thought out." The report notes its concerns that dispatchers are required to perform several other functions that are unrelated to the safe movement of trains and are forced to work in a necessarily disruptive environment, with

phones ringing, radios blaring, and dispatchers shouting, necessary because there is no communication system between dispatching desks. The assessment found insufficient staff to provide relief for vacations, personal emergencies or sickness. Instead of conflict between production and safety, the report noted that "to many middle and upper-middle managers value production over safety" and "failed to translate the organizational safety committment into effective safety programs."

Despite explicit recommendations to update the equipment used in the dispatcher's job, to reduce the workload per dispatcher, and to ensure the availability of adequate dispatching personnel no changes in these areas were made.

As the trial court noted in its opinion,

"From the evidence presented by the plaintiff, the jury could have concluded that the 1974 report put Conrail on notice of the stressfulness of the train dispatcher's job, and of the medical problems caused by that stress. The 1987 report put Conrail specifically on notice that particular problems existed in the dispatcher's working conditions, creating a hazardous situation for the people who work there. In addition, after Conrail received complaints by at least six other train dispatchers that the same conditions outlined in the 1987 report had caused their emotional and medical illnesses, the jury could have concluded that it was foreseeable to Conrail that working Mr. Carlisle for up to 13 consecutive days, 15 hours a day under those stressfilled working conditions, would result in injury to Mr. Carlisle.

'The plaintiff's evidence that Conrail negligently breached its duty to provide a safe workplace was legally sufficient to go to the jury. He presented evidence intended to show that Conrail created hazardous working conditions, knew of their potentially harmful effects on the plaintiff, and did nothing to alleviate them. Mr. Carlisle presented evidence that it was those stressful working conditions that caused his injury.' " (Appendix, A-134).

REASONS FOR DENYING THE PETITION

The opinion of the Third Circuit Court of Appeals is consistent with established precedent in holding that a railroad worker has suffered a compensable injury when his workplace was maintained in an unsafe condition which resulted in forseeable adverse effects on physical health.

The United States Court of Appeals for the Third circuit decided a narrow, fact sensitive case in an opinion consistent with established precedent. Petitioner asserts that this decision is out of step with established common law principals and that there is a conflict among the Circuits in this area. Respondent answers that Petitioner has unfairly characterized the case as one in which damages were awarded for a wholly emotional injury, rather than one in which compensation was given for physical manifestations of long term exposure to a work place that, as early as 1974, was found unduly hazardous.

Petitioner's mis-characterization is central to their argument. By branding Mr. Carlisle's case as one in which the injury was wholly emotional, they are then

able to survey the Circuits and find a conflict and are able to assert that generally accepted common law principles would deny recovery. Moreover, they attempt to place this matter in the category of cases left undecided in *Atchison, Topeka and Santa Fe Ry. v. Buell,* 480 U.S. 557 (1987) and then ask this Court to resolve this issue.

The Third Circuit opinion in this case specifically indicates that this analytical framework is inappropriate:

> "In *Buell,* the Supreme Court declined to decide whether *wholly emotional injuries* arising from work conditions were compensable under the F.E.L.A. . . . " (Appendix, A-80, emphasis added).
>
> "The injury here to Carlisle was emotional, accompanied by obvious physical manifestations. *We do not face and do not decide* the issue of whether *purely emotional injury,* caused by extended exposure to stressful, dangerous working conditions would be compensable under the F.E.L.A." (Appendix, A-88, footnote 11, emphasis added).

In short, if this Court desires to establish precedent in the area of "wholly emotional injuries" under the FELA, answer the questions left open in *Buell* and resolve any conflict among the Circuits in the area, the present case is not an appropriate vehicle.

Assuming that Mr. Carlisle's claim was properly categorized for analytical purposes, the Third Circuit opinion is consistent with established FELA precedent and common law principles. Any discussion in this area must begin with the Act itself. Section I of the FELA 45 U.S.C. 51 provides "every common carrier by railroad . . . shall

be liable in damages to (employees) . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier . . . " Thus the FELA views the railroad "as a unitary enterprise, its economic resources obligated to bear the burden of *all injuries* befalling those engaged in the enterprise arising out of the fault of any member engaged in the common endeavor." *Sinkler v. Missouri Pacific Railroad Co.,* 356 U.S. 326, 330, 78 S.Ct. 758, 762 (1958) (emphasis added).

The Act does not propose to define negligence, but rather leaves that task to the common law as announced by the federal courts. *Urie v. Thompson,* 337 U.S. 163, 69 S.Ct. 1018 (1949). In deciding questions of negligence, the Courts have uniformly recognized that a railway is under a non-delegable duty to provide its employees with a reasonably safe place to work. *Nivens v. St. Louis S.W. Ry.,* 425 F.2d 114 (5th Cir. 1970). As a corollary to this duty to maintain safe working conditions, the carrier is required to provide its employee with sufficient assistance in the performance of the work assigned to him. *Blair v. Baltimore & O.R.R.,* 323 U.S. 600, 65 S.Ct. 545 (1945). Furthermore, the act does not limit recovery to certain types of injury while excluding others, nor does it limit recovery to damages sustained in a single incident or accident in the work place. In *Urie v. Thompson, supra,* the Supreme Court noted:

> "We recognize, of course, that when the statute was enacted, Congress' attention was focused primarily upon injuries and death resulting

from accidents on interstate railroads. Obviously, these were the major causes of injury and death resulting from railroad operations, but accidental injuries were not the only ones likely to occur. And nothing in either the language or the legislative history discloses expressly any intent to exclude from the Act's coverage *any injury* resulting in "whole or in part from the negligence" of the carrier. If such an Act can be found, it must be read into the Act by sheer inference . . .

On its face, *every injury* suffered by an employee while employed by reason of the carriers negligence was made compensable. The wording was not restrictive as to employees covered, the cause of the injury, except that it must constitute negligence attributable to the carrier; *or the particular kind of injury resulting*. To read into this all inclusive wording a restriction as to the kinds of employees covered, the degree of negligence required or *the particular sorts of harm inflicted*, would be contradictory to the wording, the remedial and humanitarian purpose, and the constant and established source of liberal construction of the Act followed by this Court."

(337 U.S. at 181-82, 69 S.Ct. at 1030) (emphasis added)

As noted above, federal courts are required to apply common law principles in their development of FELA jurisprudence. In so doing, they often search for the majority common law rule as it has emerged from state court decisions. A particularly illuminating example of this is *Teague v. National Railroad Passengers Corp.*, 708 F.Supp. 1344 (D.Mass. 1989). In that matter, Petitioner claimed that his employer had engaged in a course of

conduct that harassed and humiliated him. This stressful condition of employment led him to develop ulcers, duodenitis and chest pain. To put it differently, the employee did not allege a single accident or incident as the precipitating cause but merely alleged a medically diagnosed condition directly attributable to the emotional stress under which he worked. That is precisely the position of the Respondent in the instant case. Given this fact pattern, the *Teague* Court concluded:

> "The Court holds that a review of developments in the state common law, see S. Plotkin, The Evolution of Tort Liability for Psychic Injuries: A Proposal to Protect Relational Interests (1986) (unpublished thesis on file at the University of Virginia Law School), as well as developments in Supreme Court FELA jurisprudence reveal a sufficient claim has been made out. Teague claims that the insults and harassment of his supervisors at Amtrak caused him mental anguish as well as physical ailments. *As the Supreme Court has observed, 'While the traditional rule was that a plaintiff could not recover from mental injuries unconnected with actual or threatened impact, the majority of jurisdictions now appear to have abandoned that rule.' Buell,* 480 U.S. at 569, n. 20., 107 S.Ct. at 1418 n.20. Indeed, the present majority rule allows recovery for 'mental distress [when] certified by some physical injury, *illness* or other objective physical manifestation'." Prosser and Keeton on the Law of Torts, Sec. 54 at 364 (5th Ed. 1984); see e.g., *Payton v. Abbott Labs,* 386 Mass. 540, 437 NE 2d. 171 (1982); Restatement (Second) of Torts, Secs. 436, 436A and Comments. (Emphasis added)

As noted above, both the United States Supreme Court in *Buell* and Professor Keeton have concluded that a single precipitating event causing an immediate physical injury is not a condition precedent to the tort of negligent infliction of emotional distress. Particularly instructive is Professor Keeton's analysis:

> "Starting with an early Irish decision, the great majority of courts have now repudiated the requirement of impact, regarding as sufficient the requirement that the mental illness be certified by some physical injury, illness or other objective physical manifestation. (Prosser and Keeton, supra., p. 364).

In support of this analysis, Professor Keeton refers to *Payton v. Abbott Labs*, 386 Mass 540, 437 NE 2d. 171 (1982) which is also the standard adopted in *Teague* as representative of the majority common law rule. In that case, females whose mothers had ingested a cancer-causing drug during pregnancy attempted to recover from their own fear of getting cancer, although none of them had the disease or other symptomology at the time of the suit. The Court in denying their claim noted:

> "The Restatement (Second) of Torts Sec. 436A (1965) sets forth what is still the rule adhered to by the majority of American courts: 'If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another and it results in such emotional damage alone without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance.' The cases generally hold that physical harm is required but (in accordance with the Restatement (Second) of Torts Sec. 436(2)(1965))

> the harm need not be caused by impact for trauma; *physical harm resulting from emotional stress is sufficient.*"
>
> (at 552) (emphasis added)

Given the above, a search for a concise statement of the majority rule is in order. Both the *Teague* court and Professor Keeton point to *Payton v. Abbott Labs, supra*, as containing such a statement. The Court held:

> "We therefore conclude on the basis of the preceding analysis, that in order for any of the plaintiffs to recover for negligently inflicted emotional distress, she must allege and prove that she suffered physical harm as a result of the conduct which caused the emotional distress. We answer further that a plaintiff's physical harm must either cause or be caused by the emotional distress alleged and that the physical harm must be manifested by objective symptomology and substantiated by expert medical testimony. Finally, the emotional stress for which compensation is sought must be reasonably foreseeable; unless a plaintiff proves that the defendant knew or should have known of special factors affecting that plaintiff's response to the circumstances of the case the plaintiff can recover only for that degree of emotional distress which a reasonable person that normally constituted would have experienced under those circumstances. Whether the emotional distress which a plaintiff has alleged to have experienced is reasonable is to be determined by the finder of the fact.
>
> (at 556-557)

With the above state rule in mind, it is now appropriate to look for FELA cases similar to Respondent's.

In *McMillan v. Western Pacific Railroad Company*, 54 Cal. 2d 841, 9 Cal. Rptr. 361, 357 P.2d. 449 (1960), the Court evaluated an FELA claim pressed by a train dispatcher who alleged that the railroad had negligently subjected him to working conditions "of unusual responsibility, stress and tension in that he was required to operate a system of central traffic control of defendant's railroad, which system involved multitudinous and complex and mechanical factors and mental decisions, extreme responsibility, constant but shifting attention and numerous clerical functions which imposed an unusual stress and burden upon plaintiff's physical and nervous systems which caused plaintiff to suffer a severe mental collapse . . . " (at 357 P.2d. 449). In short, the cause of action asserted in this case is virtually identical to those of the respondent in the present matter.

In holding that the plaintiff had stated a cause of action under the FELA, the Court analyzed *Urie v. Thompson, supra,* in detail. They noted that the "injury" in *Urie* was silicosis, an occupational disease acquired during long term exposure to the work place. It was thus clear that the term "injury" as used in the FELA context was not limited to the trauma associated with a sudden accident, but rather was a term that included adverse effects on the employee's health.

Based on the reasoning, the court had no difficult in holding that a train dispatcher, who suffered a nervous breakdown as a result of the conditions under which he worked, had stated a claim under the FELA.

In *Yawn v. Southern Ry. Co.*, 591 F.2d 312 (5th Cir. 1979), seven clerical workers brought an action under the

FELA alleging that the railroad had negligently failed to provide them with adequate help and adequate time within which to do their jobs, thereby causing them to suffer "physical pain, mental anguish and gastrointestinal disturbances" (591 F.2d at 314). While not passing on the issue of the gravity of the plaintiffs' injuries, the Court noted that failure of the employer to provide sufficient manpower for the job at hand, was negligence sufficient to impose liability under the act.

In *Welby v. Consolidated Rail Corp.*, 671 F.Supp. 1015 (M.D.Pa. 1987) an employee claimed that his myocardial infraction resulted from the excessive hours which the railroad required him to work. Again, the Court held that this represented a valid claim of injury stemming from an unsafe work place and was thus within the scope of the FELA.

In *Amendola v. Kansas City Southern Railway Company*, 699 F.Supp. 1401 (W.D.Mo. 1988), the court evaluated a claim that was clearly "wholely emotional," i.e. workers exposed to asbestos sought recovery for their fears of developing cancer in the future. In denying this claim, the court concluded a review of the development of FELA and emotional injury law that is particularly instructive in the instant case:

> "An important threshold issue to be addressed is whether the FELA even covers the tort of negligent infliction of emotional distress. In answering this question, the court must glean guidance from common law developments. *Buell*, 107 S.Ct. at 1417. This court finds that the tort of negligent infliction of emotional distress is covered by the FELA because it is clear that a

> majority of states now recognize the tort . . . Furthermore, several federal courts have recently found that a claim for the negligent infliction of emotional distress is cognizable under the FELA. See *Taylor v. Burlington N.R.R.*, 787 F.2d. 1309 (9th Cir. 1986); *Ballard v. Central Vermont Ry.*, 565 F.2d 193 (1st Cir. 1977); *Gillman v. Burlington Northern R.Co.*, 673 F.Supp. 913 (N.D. III. 1987); *Halko v. New Jersey Transit Rail Operations, Inc.*, 677 F.Supp. 135 (S.D.N.Y. 1987). This trend is consistent with the interpretation of the FELA as 'broad remedial statute' requiring a 'Standard of liberal construction in order to accomplish [Congress] objectives.' "

(699 F.Supp. at 1408)

In short, the majority rule supports recovery for negligent infliction of emotional distress under the FELA

In 1929, the eminent jurist, Benjamin Cardoza, in his address to the New York Academy of Medicine prophetically stated:

> "We lawyers are becoming increasingly aware that the difficulty in solving legal problems has little to do with discovering what the law is; but has everything to do with discovering what the *facts* are.
>
> Men of science, show us in the law what the facts are and the law will burst forth from its seed and turn its branches to the light." (Emphasis added)

In *Urie v. Thompson, supra,* medical science acknowledged a foreseeable link between a railroad worker's exposure to silicia dust and silicosis prompting the U.S.

Surpeme Court to recognize the compensability of a railroader's silicosis under the FELA.

In the instant case, expert medical science, specifically, medical experts for Mr. Carlisle, i.e. Dr. Rosch and Dr. Real, and for the railroad, i.e. Dr. Kool, acknowledged a forseeable link between the emotional injury with physical manifestations of Mr. Carlisle and the unsafe conditions of his work place.

Medical science through the medical experts in this case demonstrated to the trial court and jury what the facts were and the trial court and the Third Circuit permitted the law to "burst forth from its seed and turn its branches to the light."

CONCLUSION

While this Court may desire to resolve the issue of recovery for "wholly emotional injury" under the FELA, that, as the Third Circuit stated, is not the issue in the present case. The holding of both the trial and appellate courts in this matter are consistent with established precedent and represent an appropriate analysis of a narrow, fact sensitive case.

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